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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

JEROME MILLER, ET AL., *Appellants,*

v.

MARCEL YOUAKIM, ET AL., *Appellees.*

On Appeal From the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

For:

AMERICAN ORTHOPSYCHIATRIC ASSOCIATION
AMERICAN PSYCHIATRIC ASSOCIATION
CHILD ADVOCACY CENTER
CHILD WELFARE LEAGUE OF AMERICA, INC.
CHILDREN'S DEFENSE FUND OF THE WASHINGTON RESEARCH PROJECT, INC.
FAMILY SERVICE ASSOCIATION OF AMERICA
NATIONAL ASSOCIATION OF SOCIAL WORKERS
NATIONAL CONFERENCE OF CATHOLIC CHARITIES
NATIONAL URBAN LEAGUE, INC.

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Dated: July 17, 1978

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The organizations listed above respectfully move, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief amici curiae in the above-entitled case. Appellees have consented to the filing. Consent has been denied by the appellants.

INTEREST OF AMICI

The American Orthopsychiatric Association, founded in 1924, is an interdisciplinary organization of 4,000 members, including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of abnormal behavior. Many of the Association's members are regularly involved in the treatment of children who are the products of broken homes. These children have a desperate need for substitute parental relationships that often can best be provided by the children's relatives.

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine who specialize in psychiatry. Almost 24,000 of the nation's approximately 30,000 psychiatrists are members of the Association. It has participated as an amicus curiae numerous times in cases throughout the country involving mental health issues. The Association believes that resolution of the issues presented in the instant case will have an important impact on the psychological well-being of needy children.

The Child Advocacy Center is a local advocacy project committed to improving the child welfare system in Washington, D. C. The Center has conducted a detailed study of the District of Columbia's system for providing services to abused and neglected children and their families, and was instrumental in passage of recent revisions in child abuse legislation in the District directed at ensuring more appropriate services to this population. It has also been involved in litigation challenging the inappropriate institutionalization of children.

The Child Welfare League of America, Inc. is a national voluntary standard setting organization with over 400 local affiliates, many of which are engaged in placing needy children in foster care and in providing services to the children and their families. The League is strongly opposed to any discrimination against relatives in the out-of-home placement of needy children.

The Children's Defense Fund of the Washington Research Project, Inc. (CDF) is a nonprofit public interest organization which gathers evidence about and attempts to remedy, through monitoring, litigation and other means, the needs of children in the United States. CDF has recently completed a two year study of children living outside of their homes in institutions and other foster placements. The study, which will be published in the Fall of 1978, included a detailed review of placement policies and practices in seven states as well as a survey of child welfare offices in 140 counties throughout the country. From its experience, CDF concluded that placements with willing relatives should be given preference over placements with strangers or in institutions. CDF believes that the denial of benefits under the AFDC-FC program to children living with relatives is one of the major impediments to securing appropriate out-of-home care for needy, neglected children.

The Family Service Association of America is a membership federation of approximately 285 community supported and community serving family agencies, each of which exists to aid families and individuals with personal or social needs and to advocate for the needs of families under stress. The Association is concerned that the exclusion of relative placements from the AFDC-FC program will severely hamper efforts

of some of its member agencies to secure the best possible care for needy children.

The National Association of Social Workers (NASW) is the largest professional association of social workers in the world, comprised of 80,000 social workers with chapters in all fifty states and the District of Columbia. It is devoted to the advancement of sound public policy for social work consumers as well as professionals. NASW has been particularly involved in recent years in working to combat child abuse and neglect through training directed toward administrators and direct service workers. As staff in public and private child welfare agencies, many of NASW's members are involved in mitigating the effects of family disruption and, where necessary, placing needy children in out-of-home care. NASW believes that the exclusion of relative placements from the AFDC-FC program impedes the possibility for continuity and stability in substitute care which is so crucial to the well-being of these children.

The National Conference of Catholic Charities is an association of several hundred Catholic charitable and human service agencies located in 142 of the 153 dioceses in the United States. The Conference and its member agencies have long been involved in family and child services, including the provision and administration of foster care placements. The Conference is particularly concerned that the denial of AFDC-FC assistance to children living with relatives threatens family unity and makes it more difficult to maintain the religious and cultural identity of needy children.

The National Urban League, Inc. has affiliates in 112 cities, devoted to assisting urban communities with

minority group problems that develop out of poverty, discrimination and neglect. The League has recently sponsored an extensive study of informal fostering arrangements in black families that documents the importance of extended family relationships for the development of black children. Hill, Informal Adoption Among Black Families (1977). The League firmly believes that the continued vitality of extended families is seriously threatened by the discrimination against relative placements that is challenged in this case.

Amici share a deep conviction that the family must be preserved as the fundamental social unit in our society. In cases where children must be removed from their homes, *Amici* believes that every reasonable effort should be made to make it possible for the child to be returned to his or her natural parents. Where return to the parents is not possible, we believe that each child is entitled to a permanent home.

For many neglected children, placements with relatives may offer the best opportunity for family continuity as well as for the development of healthy, caring substitute relationships. The policies challenged in this case, however, make it difficult, if not impossible, for child placement authorities in some states to place children with their relatives, even where that would be in the children's best interests. *Amici* submit the attached brief in order to make the Court aware of the important consequences of the case for children in this country, as well as to insure that the Court is fully

aware of the background and history of the AFDC-FC program as a program intended to make the best possible care available for needy neglected children.

Respectfully submitted,

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NATIONAL CONFERENCE OF CATHOLIC CHARITIES
NATIONAL URBAN LEAGUE, INC.

INTEREST OF AMICI

The Interest of Amici is set out, *supra,* in the Motion for Leave to File this brief.

QUESTION PRESENTED

Whether a state may deny foster care benefits under Section 408 of the Social Security Act, 42 U.S.C. § 608, to otherwise eligible children who have been placed in state-approved foster homes of their relatives by a juvenile court or other child placement agency.

STATEMENT

The AFDC-foster care program (hereafter AFDC-FC) was enacted in 1961 to help finance out-of-home care for needy, neglected children. The program provides federal financial assistance to the states for the care and support of children who have been removed by court order from the homes of their parents or other caretaker relatives because conditions in the homes were not conducive to the children's welfare. 42 U.S.C. § 608(a)(1). The program is limited to children who prior to their removal had been receiving or who were eligible for public assistance under the Aid to Families of Dependent Children program (hereafter AFDC). 42 U.S.C. § 608(a)(4).

The question in this case is whether states may exclude from the AFDC-FC program neglected children who are placed by a court or child placement agency in the homes of their relatives, merely because, unlike children who are placed with strangers, the children would continue to qualify for assistance under the basic AFDC program. Only a small number of states exclude relative placements from their AFDC-FC programs.[1] The remaining states allow foster payments

[1] According to the government's Brief Amicus Curiae in support of the petition for certiorari when this case was previously before this Court, fourteen states, including Illinois, exclude children living with relatives from the AFDC-FC program. Appendix 56.

for children placed with relatives, although a decision in favor of the state in this case could jeopardize federal payments to those states. *See, Burns* v. *Alcala,* 420 U.S. 575, 586 (1975).

In enacting the AFDC-FC program, Congress relied upon the child protection laws of each state to determine which children are in need of foster care support. Under these laws, children may be removed from the homes of their parents or other legal guardians upon a finding by a court that conditions in the home are not conducive to the children's welfare.[2] *See generally,* Katz, Howe & McGrath, *Child Neglect Laws in America,* 9 Family L.Q. 1 (1975). Removal of a child through neglect[3] proceedings does not ordinarily terminate the parents' legal rights regarding the child, but rather is regarded as a temporary step to protect the child from immediate harm. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 Stan. L. Rev. 623, 633-634 (1976);[4] Areen, *supra* at 928-30.

Where a child must be removed from the home of a parent or guardian, state laws give considerable dis-

[2] Standards for removal range from physical abuse or neglect to the absence of "proper parental care" or "proper attention." Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases,* 63 Geo. L.J. 887, 920-928 (1975); Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Ed. Rev. 599, 604 (1973).

[3] For convenience, *Amici* refer to all judicial proceedings leading to removal of a child from the home for dependency, neglect or abuse as "neglect" proceedings.

[4] Wald states that termination of parental rights at the initial neglect hearing is rare in most cases. Wald, *supra* at 634.

cretion to the juvenile court or a child welfare agency to select the placement that is best suited to the child's individual needs and family situation.[5] In recognition of the important role of extended families in our society, however, many state laws specifically mention relatives' homes as a placement option for neglected children.[6] Moreover, even where relatives' homes are

[5] In this case, the Illinois Juvenile Court Act provides that juvenile courts should secure for the child "custody, care and discipline as nearly as possible equivalent to that which should be given by his parents." Ill. Rev. Stat. ch. 37, § 701-2(1) (Appendix 32-33). The language of other state laws is generally as broad. *See, e.g.*, Ala. Code tit. 13, § 361 (court may make any order which is "for the best interest of the child"); Ga. Code Ann. § 24A-2301 (court shall make the "disposition best suited to the protection and physical, mental and moral welfare of the child"); Md. Cts. & Jud. Proc. Code Ann. § 3-820 ("The overriding consideration in making a disposition is a program of treatment, training and rehabilitation best suited to the physical, mental and moral welfare of the child consistent with the public interest"); N.C. Gen. Stat. § 7a-286 (court shall "select the disposition which provides for the protection, treatment, rehabilitation, or correction of the child"); N.D. Cent. Code § 27-20-30 (court may take "any action best suited to the protection and physical, mental and moral welfare of the child"); Pa. Stat. Ann. tit. 11, § 50-321 (court shall make the "disposition best suited to the protection and physical, mental and moral welfare of the child").

[6] *Amici* have found that current dispositional laws in twenty-two states, including Illinois, list placements with relatives as one of the options for placement of neglected and dependent children. *E.g.*, Ariz. Rev. Stat. § 8-241; Colo. Rev. Stat. § 19-3-111; Fla. Stat. Ann. § 39.11; Ill. Rev. Stat. ch. 37, § 705-7; Md. Cts. & Jud. Proc. Code Ann. § 3-820; Mont. Rev. Codes Ann. § 10-1314; N.C. Gen. Stat. § 7a-286. Under Florida law, custody of a dependent child must be given to a close relative if one is able and willing to accept responsibility. Fla. Stat. Ann. § 39.10(6).

The Illinois Department of Children and Family Services has issued regulations which state that "relative resources should be explored for all children for whom placement is indicated with the exception of children relinquished for adoption." Illinois Department of Children and Family Services, Placement Manual pt. 5 (1972) (Appendix 37-40).

not specifically mentioned, no state bars the placement of neglected children with their relatives, and many placement authorities prefer relative placements where they are available.

For the reasons stated in Part II of this brief, *Amici* believe that care in relatives' homes may be the most desirable form of temporary care for many neglected children. The refusal of some states to provide foster care assistance for relative placements, however, severely restricts the use of relatives for out-of-home care for neglected children. Even where they would like to assume responsibility, many relatives cannot afford to serve as foster parents, especially for extended periods, without the additional support provided under AFDC-FC.[7] In addition, child placement authorities are often reluctant to place children with relatives, even where it would otherwise be desirable, since sig-

[7] To be eligible for the AFDC-FC program, a child must have been living in a home that was receiving or was eligible for public assistance prior to his or her removal. Relatives who might take responsibility for their care are therefore also very likely to be disadvantaged. Hill, Informal Adoption Among Black Families 61-66 (1977); Stack, All our Kin: Strategies for Survival in a Black Community 32-33 (1974).

Relatives who would like to care for neglected children often must refuse to do so because they cannot afford the additional expense, especially where long-term care may be necessary. Thus, one study of children entering formal foster care for the first time in 1966 found that 30% of the children were living with relatives prior to formal placement. Based on interviews with these caretakers, the authors concluded that "the cessation of care was a reaction to the fact that temporary care had been expected, but the extended period during which care was needed went beyond the capacity of the substitute. This often occurred despite positive attitudes toward the child and a real concern about his future." Jenkins and Norman, Filial Deprivation and Foster Care 72, 89-90 (1972).

nificantly less financial assistance will be made available to meet the child's needs than if the child were placed in the home of a stranger.[8]

In light of the importance of allowing the placement of neglected children with relatives, the recognition of relative placements under state law, and the inability of many relatives to provide care for neglected children without the assistance provided under the AFDC-FC program, it is inconceivable that Congress would have excluded relative placements from the foster care program. For the reasons that follow, *Amici* contend that Congress in fact enacted no such exclusion, and that the courts below correctly held that relative placements must be covered under the AFDC-FC program.

SUMMARY OF ARGUMENT

1. Section 408 of the Social Security Act, 42 U.S.C. § 608, provides assistance in the form of foster care payments for any eligible child who is placed in a "foster family home of any individual" or in a child-care institution. 42 U.S.C. § 608(b)(1)-(2). Section 408(f) of the Act defines the term "foster family home" to mean "a foster family home for children which is licensed by the State in which it is situated

[8] The maximum monthly AFDC payment for a dependent child is less than the average monthly AFDC-FC payment per child in a foster family home in most states for which data are available. *E.g.*, Alabama ($59/$95), California ($175/$220), Louisiana ($50/$152), Mississippi ($30/$121), and North Dakota ($81/$155). *See*, HEW, Social Security Administration, Office of Research and Statistics, *Public Assistance Statistics, October 1977* 12 (March 1978); HEW, Social Security Administration, Office of Research and Statistics, *Aid To Families with Dependent Children, July 1977* 6 (March 1978).

or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing." 42 U.S.C. § 608(f). This language is extremely broad and gives no indication that Congress intended to exclude any suitable homes in which foster children might be placed by a juvenile court or other child placement agency.

The background and legislative history of the AFDC-FC program further demnostrate that Congress intended the phrase "foster family home" to include any family placement that is determined by child placement authorities to be in the best interests of the child, including placements in the homes of relatives. The AFDC-FC program was enacted in response to the refusal in 1961 by Secretary of Health, Education and Welfare Arthur Flemming to permit states to disqualify children from the basic AFDC program because their homes were regarded as unsuitable by the state. These suitable home policies were intended to protect the welfare of children receiving public assistance under the AFDC program. In their place, Congress established the AFDC-FC program to make it possible for states to remove AFDC children from unsuitable homes and to place them into foster care that was determined to be in their best interests.

The legislative history of the AFDC-FC program makes clear that Congress' overriding concern was that neglected children receive care that is determined by child placement authorities to be in their best interests. Senator Kerr, who sponsored the program in the Senate in 1961, made this clear when he stated that the program "does not in any way change whatever the

law may be in a State with reference to the authority of a court, on the one hand, taking a child from its natural home, and on the other hand placing it in a foster home." 107 Cong. Rec. 6386 (April 20, 1961). Similarly, when the program was made permanent in 1962, Congress extended assistance to foster children who were placed in child care institutions so that placement authorities would not be hampered in selecting the placement that was best suited to the needs of each individual child. Finally, in 1967, Congress increased the level of federal support for the AFDC-FC program in order to "facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government." H.R. Rep. No. 544, 90th Cong., 1st Sess. 101 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 165 (1967).

This history makes clear that the term "foster family home" in section 408 includes, as its language suggests, any family placement that has been judicially or administratively determined to be in the best interests of a neglected child, including placements in the homes of relatives. Appellants' arguments to the contrary are not persuasive. Coverage of relative placements under AFDC-FC would not duplicate the AFDC program, since AFDC-FC is limited to children who have been removed by a court from their homes and whose placements are under the supervision of the state. Many children living with relatives under informal arrangements, who are eligible for AFDC, would not be eligible for AFDC-FC. In addition, AFDC-FC provides assistance and services to meet the special needs of neglected children that are not available under the AFDC program.

Finally, although the AFDC-FC program extended federal assistance to children placed with strangers who would no longer be eligible for AFDC because of their removal from their homes, there is no reason to believe that this was the only purpose of the program. It is wrong to assume that the program merely provides the same benefits as the AFDC program to a new group of children; in fact, the protections afforded by the AFDC-FC program appear to have been adopted specifically with relative placements in mind.

2. *Amici* do not contend that placements with relatives are in the best interests of every neglected child. However, placements with relatives are so often more desirable than placements with strangers or in institutions that Congress could not have intended to exclude such placements from the AFDC-FC program.

Placements with relatives may mitigate many of the problems associated with care in the homes of strangers and in institutions. The child's prior acquaintance with the relatives can reduce the trauma of separation and the loss of identity that occurs when children are placed in totally unfamiliar settings. In addition, emotional ties and a sense of trust may already exist between the relative and the child, so that the child is able to receive needed support without having to build new relationships during the time of crisis. Moreover, because of the traditional role in our society of extended families in child-rearing, relative placements may avoid the profound sense of uncertainty that makes it difficult for many foster children and nonrelated foster parents to develop the meaningful, supportive relationships that the children so desperately need.

Relative placements may also improve the likelihood that the children will be returned to their natural homes, since relative placements often make it easier for the parents to maintain contacts with the children and to continue to participate in important decisions regarding their lives. Finally, relative placements may avoid the pattern of multiple placements, with repeated separations, that may be the most damaging characteristic of foster care. Relatives are often more likely to care for children with special needs and older children, rather than request that such children be removed after problems develop. In addition, relatives may be less likely to experience the frustrations that cause many non-related foster parents to request that children be transferred from their homes after short periods.

ARGUMENT

I. NEEDY NEGLECTED CHILDREN WHO ARE PLACED BY COURTS IN THE HOMES OF RELATIVES ARE ENTITLED TO RECEIVE ASSISTANCE UNDER THE AFDC-FC PROGRAM EVEN THOUGH THEY ARE ALSO ELIGIBLE UNDER THE BASIC AFDC PROGRAM.

A. The AFDC-FC Program Provides Assistance For Any Out-Of-Home Family Placement That Is Determined By Child Placement Authorities To Be In The Best Interests Of The Child, Including Placements With Relatives.

The AFDC-FC program provides assistance to children who are removed from the homes of their parents or other relatives specified in section 406(a) of the Social Security Act after a judicial determination that continuation in the home would be contrary to the child's welfare. 42 U.S.C. § 608(a)(1). To be eligible, the child must have been receiving or been eligible for AFDC assistance in the month that the judicial pro-

ceedings began or within six months prior thereto. 42 U.S.C. § 608(a)(1). In addition, the child's placement and care must be the responsibility of the state welfare agency or another public agency that has an agreement with the welfare agency to carry out the requirements of the statute. 42 U.S.C. § 608(a)(2).

AFDC-FC provides assistance for care in a "foster family home of any individual" or in a child-care institution. 42 U.S.C. § 608(b)(1)(2). Section 408(f) of the Social Security Act defines the term "foster family home" to mean "a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing." 42 U.S.C. § 608(f). This language is extremely broad and gives no indication that Congress intended to exclude any suitable homes in which foster children might be placed.[9] The background and legislative history of the program further demonstrate that Congress intended the phrase "foster family home" to include any placement that is determined by a child placement authority to be in the best interests of the child, including placement in the home of a relative.

The AFDC-FC program was enacted in response to a ruling in 1961 by Secretary of Health, Education and Welfare Arthur Flemming that states could no longer disqualify children from the basic AFDC pro-

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[9] In contrast to the unrestricted language defining foster family homes, section 408(f) expressly excludes public institutions from the definition of child-care institution. 42 U.S.C. § 608(f). Thus, to the limited extent that Congress has wanted to restrict the types of foster placements that are eligible under the AFDC-FC program, it has done so in section 408(f) and not elsewhere in the statute.

gram because their homes were regarded as unsuitable by the state. *King* v. *Smith,* 392 U.S. 309, 323-324 (1968). While these suitable home policies often focused on the immoral behavior of the mothers or other relatives with whom the child was living, their orgiinal purpose was to protect children receiving AFDC against neglect or abuse.[10] W. Bell, Aid to Dependent Children 3 (1965). Thus, the first federal instruction to state welfare agencies regarding suitable home rules stated:

> Many state plans for Aid to Dependent Children require that the state agency shall determine that conditions in the home in which a child will live will protect the interests and promote the welfare of a dependent child. Such a provision is in keeping with the purpose of the federal Act. Under the direction of persons trained and experienced in family or child welfare, objective standards of health and care should be established and the application of such standards in particular situations carefully supervised.

Bureau Circular No. 9, Sec. 209 at 1 (May 1, 1940).[11]

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[10] A number of specific requirements in the AFDC program derive from the responsibility of the State to protect children who are receiving assistance. For example, section 402(a)(16), 42 U.S.C. § 602(a)(16), requires that where a state agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of the child, the agency must bring this fact to the attention of the appropriate court or law enforcement agencies. Section 406(b)(2), 42 U.S.C. § 602(b)(2), permits AFDC payments to be made to a person, other than the child's parent or caretaker, where the welfare agency determines that the parent or other caretaker is unable to manage funds in the interests of the child's welfare.

[11] In proposing a model suitable home policy for adoption by the states, the American Public Welfare Association similarly explained

Congress approved the Flemming Ruling a few months after it was issued, although it extended the deadline for state compliance to September 1, 1962. 75 Stat. 77, 42 U.S.C. § 604(b). At the same time, Congress enacted the AFDC-FC program as a temporary measure to make it possible to place AFDC children in suitable homes. Thus, the Senate Report stated:

> The objective of the aid to dependent children program is to provide such assistance for needy children in their own homes. As is true of other children, there are some home environments that are clearly contrary to the best interests of these children. The situation is particularly pointed up by the fact, noted earlier in this report, that the States have placed in operation statutes terminating payment when a child's home is found unsuitable because of the immoral or negligent behavior of the parent. Often, however, remedial action on behalf of the child was not possible. We believe that this undesirable situation could be avoided, in many instances, if assistance under this program were available for the care of the child in a foster family home when such care is necessary.

S. Rep. No. 165, 87th Cong., 1st Sess. 6 (1961).

There were several clear indications during the debates on the AFDC-FC program that Congress' intended neglected children to be able to receive the kind

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that the purpose of the policy was to improve the quality of home life for AFDC children:

> The maintenance of proper home environment for dependent children is vital to the success of any child welfare program. The provision for assistance under this Act affords a unique opportunity to raise the standards of home care. This feature should be stressed in the drafting of this legislation.

American Public Welfare Association, Suggested State Legislation for Social Security 26 (1935), quoted in Bell, *supra* at 30.

of care determined by child placement authorities to be in their best interests. Thus, Senator Kerr, who was the program's chief supporter on the floor of the Senate, stated that the program "does not in any way change whatever the law may be in a State with reference to the authority of a court, on the one hand, taking a child from its natural home, and on the other hand placing it in a foster home."[12] 107 Cong. Rec. 6386 (April 20, 1961). He also stated that the program's purpose was to ensure that courts "would be free to consider the situation as to the welfare of the child." *Id.* at 6387. Senator Byrd similarly stated that the program was intended to develop "the most suitable care for children who have to be provided for outside their own homes." *Id.* at 6388.

In 1962, Congress made the AFDC-FC program permanent, and it also expanded the program to permit children to be placed in child-care institutions as well as in foster family homes. Pub. L. 87-543, §§ 131(b), 135, 76 Stat. 172. The House Committee report stated that child-care institutions were added to the program "so that whatever facility is most appropriate for a particular child may be used." H.R. Rep. No. 1414, 87th Cong., 2d Sess. 17 (1962). Similarly, Senator McCarthy, who successfully proposed the child-care institution amendment on the floor of the Senate after it had been rejected in committee, explained the purpose of the change as follows:

> The issue is whether the Federal Government is going to place restrictions on programs which limit the courts from making a placement in the best interest of the child, forcing him to remain in a home which has been determined as an unsuitable placement.
>
> This amendment—and the House approved provision—opens the way for the courts to make a determination in the best interest of the child....
>
> I do not believe we want to extend Federal participation to the child whose home is unsuitable only if he is placed in a foster family home and deny it where the court determines it is in his best interest to be transferred to a child care institution.

108 Cong. Rec. 12693 (July 3, 1962). At the same time, Congress amended Section 408 to enable child placement decisions to be made by youth courts or any other state or local agency, instead of by the welfare department, as had been required under the temporary program. Pub. L. 87-543, § 155(a); 42 U.S.C. § 608(a)(2)(B).

Finally, in 1967, Congress increased the level of federal participation for foster care payments after it heard evidence that welfare agencies found it difficult to recruit adequate foster homes at current rates. *Hearings on the Social Security Amendments of 1967 (H.R. 5710) Before the House Comm. on Ways and Means*, 90th Cong., 1st Sess. 1529, 1536, 1783, 1984 (1967); *Hearings on the Social Security Amendments of 1967 (H.R. 12080) Before the Senate Comm. on Finance*, 90th Cong., 1st Sess. 1301-02 (1967). The House and

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[12] Senator Kerr's statements were made in response to questions from Senators Keating and Javits whether the new program would interfere in any way with the practice of some states of placing children in foster homes conducted by religious organizations. 107 Cong. Rec. 6386-7 (4-20-61). He also concurred in statements by Senator Javits that the program "does not attempt to fix policies in effect under the laws of any State as to the taking of a child from its natural home and placing it in a foster home," *Id.*, and that under the program the foster home would be "selected by the court." *Id.*

Senate Reports both stated that this increase was necessary to "facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government." H.R. Rep. No. 544, 90th Cong., 1st Sess. 101 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 165 (1967). In presenting the proposal to the House, Representative Byrnes stated that the more liberal payments were intended to "permit more emphasis on the welfare of the child and less on economic considerations," 113 Cong. Rec. 23062 (August 17, 1967), and Representative Ullman stated "our report encourages State welfare agencies to obtain the best possible environment for the foster child." *Id.* at 23071.

This history makes clear that throughout the development of the AFDC-FC program Congress has consistently sought to make it possible for juvenile courts and other child welfare authorities to select out-of-home care that is best suited to the needs of each neglected child.[13] The term "foster family home" in section 408 must therefore include, as its language suggests, any family placement that has been judicially or administratively determined to be in the child's best interests. The exclusion of relative placements from a state's AFDC-FC program conflicts with that definition and therefore violates the Social Security Act.

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[13] The exclusion of placements in public child-care institutions from the AFDC-FC program, *supra* note 9, is not inconsistent with this history. The availability of care in public institutions does not depend upon federal support, since the financing of institutions for children and juveniles has traditionally been the responsibility of the state.

B. Coverage Of Relative Placements Under The AFDC-FC Program Does Not Duplicate The Basic AFDC Program, Nor Is The AFDC-FC Program Limited To Children Who Are No Longer Eligible For Assistance Under The Basic AFDC Program.

Despite the broad statutory language and clear legislative history of the AFDC-FC program, appellants contend that placements with relatives are not included within the definition of foster family home for two reasons. First, they argue that the inclusion of children living with relatives in AFDC-FC would duplicate the basic AFDC program. Second, they contend that AFDC-FC was intended only to cover children who otherwise would have lost their eligibility for federal support when they were removed from an AFDC home. Since children placed with relatives remain eligible under the basic AFDC program, appellants contend they were not intended to be covered. *Amici* contend that neither of these arguments is correct.

1. Inclusion of children living with relatives in the AFDC-FC program would not duplicate the basic AFDC program, since eligibility for and the assistance provided by the two programs are both vastly different. The foster care program is available only for those children who have been found by a court to be living under conditions that are detrimental to their welfare, 42 U.S.C. § 608()(1); and the placement and care of these children must be under the supervision of the state welfare agency or another public agency. 42 U.S.C. § 608(a)(2). Children who are living in the homes of relatives under informal arrangements without a court order or agency supervision are thus not eligible for AFDC-FC, although they may be eligible for AFDC.

Furthermore, the Act mandates that foster children receive special services to allow them to return to the the homes from which they were removed or to a more permanent placement outside of their homes. 42 U.S.C. § 608(f). These services are not required for AFDC children living with relatives. Also, in recognition of the special needs of neglected children and the higher costs of caring for children under state supervision,[14] the AFDC-FC program has since its inception in 1961 made it possible for states to provide greater financial assistance for foster children than for children under the basic AFDC program.[15] Thus, AFDC-FC makes it possible for neglected children to receive additional assistance and services that they cannot receive under the basic AFDC program.

2. Although Congress clearly recognized that the AFDC-FC program would provide assistance to children placed with strangers who otherwise would have become ineligible for federal aid, there is no reason to

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[14] Congress recognized in 1961 that AFDC-FC payments would be determined "according to State standards as to the appropriate amount needed for such care," S. Rep. No. 165, *supra* at 7, not necessarily upon the amounts paid under AFDC. As a result, states generally paid more for children under the AFDC-FC program than under AFDC. In 1967, Congress increased the level of federal participation in foster care payments because "foster family care is more costly than care in the child's home." H.R. Rep. No. 544, *supra* at 101; S. Rep. No. 744, *supra* at 164.

[15] Higher payments are necessary because neglected and abused children who are removed from their homes by court order have special needs that distinguish them from other children. They often need special medical attention, nutritional supplements, psychological care or educational programs to make up both for the deprivations that they have suffered in the past and for the trauma of the separation itself. In addition, foster homes must meet the additional costs necessary to satisfy state licensing requirements.

believe that Congress intended this to be the program's only purpose, as appellants contend.[16] This argument erroneously assumes that the AFDC-FC program merely duplicated the AFDC program for a new group of children, rather than providing special assistance and services that are not provided under AFDC. Since neglected children who are placed with their relatives have the same needs as children who are placed with strangers, and since related foster parents have the same responsibilities as non-related foster parents, it is wrong to assume that children placed with relatives had no need for the new program. Furthermore, in at least two instances, the protections afforded by the AFDC-FC program appear to have been adopted with relative placements specifically in mind.[17]

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[16] Appellants rely on the language of section 408(a)(1), which they contend demonstrates that Congress intended the AFDC-FC program only to reach children who would no longer be eligible for AFDC. However, the legislative history of the 1961 Act makes clear that the purpose of section 408(a)(1) was to insure that the program only was available for children who became eligible after April 30, 1961, since Congress wanted the program to extend to new placements, not to those that were already in existence. S. Rep. No. 165, *supra* at 7.

[17] Section 408(a)(4)(B)(i) of the Act, 42 U.S.C. § 608(a)(4)(B)(i), is also inconsistent with appellants' argument that AFDC-FC was intended only to provide assistance to children who would otherwise lose AFDC benefits because of their removal from the home of a parent or relative. Under that section, a child is eligible for AFDC-FC whether or not he or she was actually receiving AFDC benefits, so long as he or she was eligible for assistance at the time court proceedings were begun. If Congress intended the program only to replace benefits that would be lost by the child's removal from an AFDC home, it would have had no reason to cover children who were not receiving AFDC benefits when they were removed.

First, section 408 protects neglected children by requiring that placements must be in foster family homes that are licensed *or approved* by the state.[18] 42 U.S.C. § 608(f). The approval mechanism was apparently added to safeguard children placed in the homes of relatives, since a number of states, like Illinois, do not require relatives to be licensed as foster homes.[19]

[18] Under Illinois law, homes of relatives are exempted from the requirement of receiving a license before they may care for children. This is not because the state wishes to prevent children from being placed with relatives, but because it does not believe relatives should be encumbered by the licensing requirements. *Youakim* v. *Miller*, 562 F.2d 483, 488 n.6 (7th Cir. 1977). In this case, both of the lower courts found that the Youakim family had been approved as meeting the state's standards for foster family homes. *Id.* at 488. Therefore, this case does not present the question whether a state may exclude relatives from the AFDC-FC program by prohibiting the placement of children in such homes altogether.

[19] While AFDC assistance was available prior to 1961 for children living with certain relatives, 42 U.S.C. § 606(a), there had long been concern that, in order to save money, states would remove children from institutions and place them indiscriminately with relatives without considering the needs of the child or the conditions of the home. W. Bell, *supra* at 21. Thus, the federal policy regarding suitable homes stated:

> A special responsibility exists with respect to children who may be removed from an institution or a foster home to the home of a relative who might be eligible to receive public assistance for their care under the Aid to Dependent Children program. Placement of children even in the home of a relative warrants special care in protecting the interests of the child by use of the essential skills that have been developed in the field of child placement.

Bureau Circular No. 9, *supra*. This concern apparently motivated the drafters of the AFDC-FC program to require that relative homes satisfy state standards even though they were not required to be licensed.

Second, in the years immediately preceding passage of the AFDC-FC program, a number of states had adopted procedures for the "voluntary" placement of AFDC children with relatives in cases where the parents' homes were found unsuitable. W. Bell, *supra* at 124-136. In these states, many welfare mothers were coerced into placing their children with relatives, although a court might not have ordered the children's removal had formal proceedings been initiated. *Id.* In order to protect the rights of parents, section 408 (a)(1) mandates that eligible children may only be removed from the AFDC home by court order. S. Rep. No. 165, *supra* at 7. Adoption of this safeguard further indicates that Congress expected placements with relatives to be covered under AFDC-FC.[20]

In sum, neither of the arguments made by appellants for limiting the scope of the AFDC-FC program is supported by the scheme of the program. Instead, the statutory language should be given its full breadth by applying it to all out-of-home family placements that are determined by a juvenile court or other child placement agency to be in the best interests of the child, including placements with relatives.

II. THE EXCLUSION OF CHILDREN LIVING WITH RELATIVES FROM THE AFDC-FC PROGRAM DENIES MANY NEGLECTED CHILDREN THE PLACEMENT THAT IS BEST SUITED TO THEIR NEEDS

The selection of the most suitable placement for a child who has been removed from his or her home

[20] The problem of coerced placements still exists. *See Smith* v. *Organization of Foster Families*, 431 U.S. 816, 834 (1977); Mnookin, *supra* at 601 (1973); Wald, *supra* at 626 n. 4; Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. Pitt. L. Rev. 1, 23 (1973).

should depend upon the individual needs of each child and the family situation that caused the removal. Placement with relatives is not in the best interests of every neglected child, nor are relatives always available when placement with them would be preferable.[21] Nevertheless, *Amici* contend that placements with relatives are so often more desirable than placements with strangers or in institutions that Congress could not have intended to exclude such placements from the AFDC-FC program.

Neglected children who are removed from homes by court order are often the most vulnerable children in our society. Not only have they suffered the economic, physical and psychological deprivations that caused their removal, they face the trauma of separation from the few people, institutions or surroundings on whom they have depended for support. Mnookin, *supra* at 623-624.[22] Even where they have been removed from unsuitable homes, separation from parents is extremely painful to children. J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 20 (1973).

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[21] Many neglecting or abusing parents, for example, are isolated from their relatives. Giovannoni & Billingsley, *Child Neglect Among the Poor: A Study of Parental Inadequacy in Families of Three Ethnic Groups*, 49 Child Welfare 196 (1970).

[22] Esther Hill has described the situation of a foster child in the following terms:

> Everything the child has known in the past disappears. Everything he experiences is strange—the bed he sleeps in, the location of the bathroom and the closet for his clothes, the food, the family routine, the toys, the yard, the school, the people in close proximity to him. Nothing which happens from day to night is the same and there is no person to look to for a familiar response.

Hill, *Is Foster Care the Answer?*, 15 Pub. Welf. 67, 69 (1957).

Moreover, foster children experience profound misgivings about their own identities and crippling conflicts of loyalty to their parents. Kadushin, Child Welfare Services 425-429 (2d ed. 1974); Wald, *supra* at 645; Mnookin, *supra* at 624-25; Buxbaum, *The Problem of Separation and the Feeling of Identity*, Child Welfare 8 (1955).

Generally, placements with relatives are more likely than placements with non-relatives to permit foster children to overcome these harms. The child's prior acquaintance with the relatives may reduce the trauma of separation and the loss of identity that occurs when children are placed in a totally unfamiliar setting.[23] In addition, emotional ties and a sense of trust may already exist between the relative and the child, so that the child is able to receive needed support without having to build entirely new relationships during the time of personal crisis. Finally, children may be better able to accept the love and direction of their relatives without having to question their loyalty to their natural parents.

Clinical studies have shown that foster children very often suffer a profound sense of uncertainty caused by the unplanned nature of their placement and by its deliberate impermanence. Because foster care is intended

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[23] Relatives may also be more likely to accept all of the siblings in a family in order to keep the family together. The presence of siblings can be an important factor in allowing foster children to adjust to their new surroundings and to the separation from their home. Aldridge and Cautley, *Foster Home Placements of Siblings*, 55 Child Welfare 85, 91 (1976). Placement with relatives may also avoid disruption in cultural or religious values, which is important in helping to maintain the child's sense of identity. Erikson, Identity: Youth and Crisis 21-25 (1968).

to be temporary, *Smith* v. *Organization of Foster Families, supra,* 431 U.S. at 823-24, the children and foster parents often spend long periods in emotional limbo, not willing or able to develop close and trusting relationships that could help the child develop. Kadushin, *supra* at 434. Thus, based on a study of 144 foster children, Bryce and Ehlert concluded

> . . . that no child can grow emotionally while in limbo, never really belonging to anyone except on a temporary and ill-defined or partial basis. He cannot invest except in a minimal way (just enough to survive) if tomorrow the relationship may be severed. . . . To grow the child needs at least the promise of permanence in relationships and some continuity of environment.

Bryce and Ehlert, *144 Foster Children,* 50 Child Welfare 499, 503 (1971). This is in part due to the foster parents' own feelings of ambiguity:

> The foster parents cannot summon up the conviction to convey to the child convincingly that he belongs to them, that they expect certain things of him, and at times, demand things of him. Even if such intensity were posible, it would mislead the child in view of his ever impending departure. In the absence of a final sense of belonging and investment, effectiveness of authority inherent in the parent-child relationship is missing . . . familial identification is not possible.

Id.

Placements with relatives cannot, of course, totally avoid the shallowness caused by the uncertainty and temporariness of foster placements. But they may be able to minimize these effects, largely because in our society relatives are traditionally accepted as having

an important role in raising and caring for children.[24] As Mr. Justice Powell wrote last term,

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger concept of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common-home. Decisions concerning child rearing . . . long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

Moore v. *City of East Cleveland, Ohio,* 431 U.S. 494, 504-505 (1977).

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[24] Recent studies have documented the extensive informal fostering patterns among relatives in the black community. *See, e.g.,* Hill, Informal Adoption Among Black Families (1977); Stack, All Our Kin: Strategies for Survival in a Black Community (1974). Increasing numbers of relatives, however, may be finding it difficult to assume such responsibility in view of rising rates of inflation and unemployment. Hill, *supra* at 72.

An important goal of foster placements, recognized in section 408(f) of the Act, is the return of the children to their parents. Foster placements with relatives may make it more likely that this goal will be achieved. The most important reason for this is that the likelihood of a child's returning to his or her natural parents is directly related to the number and frequency of contacts between the parents and the child during placement.[25] Fanshel and Shinn, Children in Foster Care 93-9 8(1978); Fanshel, *Parental Visiting of Children in Foster Care; Key to Discharge?*, 49 Soc. Serv. Rev. 493 (1975).[26]

Placement with relatives may encourage parent-child contacts because parents may feel more comfortable and welcome in the home where their children are living.[27] Non-relative foster parents may resent the parents or be threatened by them and therefore may wish to avoid contact as much as possible. Kadushin, *supra* at 442-445; Shapiro, Agencies and Foster Children 44 (1976); Littner, *The Importance of the Natural Parents To the Child in Placement*, 54 Child Welfare 175, 176 (1975). Relatives may also be more willing to arrange visits to fit the parents' schedules, and to allow the parents to participate in decisions regarding the children while they are living apart.[28]

Finally, although in theory foster children who cannot be returned to their homes are supposed to be given a new permanent home through adoption, the reality is that most foster children remain in foster care for long periods without any formalized permanent placement.[29] Many of these children experience a series of short-term placements, as they are repeatedly moved from one home to another.[30] The psychological harm caused

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[25] Contact with biological parents has also been found to improve the child's initial adjustment in the foster home. Kadushin, *supra* at 441-442, 452; Weinstein, The Self-Image of the Foster Child 17 (1960); Wald, *supra* at 647 n. 115, 678, 680-81.

[26] Placement with relatives may also facilitate the return of foster children to their parents in a more subtle way. As this Court noted in *Smith* v. *Organization of Foster Families, supra,* where a child is living with a more affluent foster family, as is often the case, there may be a bias on the part of agency personnel and courts to presume that continuation of the placement will be in the best interests of the child, even though no harm will result to the child from being returned to his or her home. 431 U.S. at 834. Placements with relatives are likely to be less subject to these pressures against returning foster children to their natural families.

[27] There is evidence that parents who are separated from their children prefer placements with relatives. Leichter and Mitchell, Kinship and Casework 115-116, 239 (1969).

[28] Until parental rights have been terminated, the parents retain the right to participate in many decisions regarding the child's care. *Smith* v. *Organization of Foster Families, supra,* 431 U.S. at 827-828; Wald, *supra* at 632.

[29] Based on available data, Wald estimated that between 40 and 80 percent of all children presently removed from home by court order are never returned to their parents. Wald, *supra* at 662. The chances of return are greatest in the first year after removal, and they diminish considerably after that point. *Id.* The Children's Defense Fund in its survey of child welfare offices in 140 counties found that over 52% of foster children remained in care for more than two years, and 33% for more than four years. Other studies have found the average foster placement to last about five years. Vasaly, Foster Care In Five States: A Synthesis and Analysis of Studies from Arizona, California, Iowa, Massachusetts and Vermont 23 (1976); Fanshel and Grundy, Computerized Data for Children in Foster Care: First Analyses from a Management Information System in New York City 7 (1975).

[30] The record in *Smith* v. *Organization of Foster Parents, supra,* showed that nearly 60% of the children in foster care in New York City had experienced more than one placement, and about 28% had experienced three or more. 431 U.S. at 837. The CDF survey of child welfare offices in 140 counties found that 46% of the children in care had more than one placement. Data from studies of foster care in Arizona, California, Iowa and Massachusetts revealed similar placement patterns. Vasaly, *supra* at 55-57.

by these repeated separations may be the most damaging aspect of the current foster care system.[31]

Placements with relatives may mitigate the problems of multiple placements in foster care. Relatives may be more willing to care for children who have behavior problems or other special problems, Wald, *supra* at 697, and for older children, whereas strangers often do not want to keep such "problem" children. As a result, these children are placed inappropriately. They must often be moved from home to home, ending up in institutions or group homes. Citizens' Committee for Children of New York, Group Homes for New York City Children 3 (1976). In addition, because they may have an easier time developing close relationships to the children, relatives may not experience the same frustrations that cause many non-related foster parents to

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[31] The psychological damage done to children by repeated transfers has been described by Kadushin:

> Removal from one foster home and replacement in another imposes on the child the emotional burden of repeated separation and change. Every replacement reactivates, and hence reinforces, previous separation and rejection experiences and tends to confirm for him any predisposition he may have to regard himself as unacceptable to others. It increases the child's difficulty in determining who he is and where he belongs and in establishing a stable sense of identification. It is likely to increase his lack of trust in parental figures. The child is afraid to invest himself in relationships with others because of the experience of hurt, and such relationships are maintained at a shallow level. Frequent replacement makes it more likely that the child will manifest emotional problems and that subsequent placement will fail.

Kadushin, *supra* at 445. Summarizing the available literature, Wald found three ways in which children are injured by unstable placements: (1) each separation involves the breaking of attachments that cause insecurity and makes it more difficult to form future attachments; (2) separation destroys continuities that are important to the child's development; (3) the child's uncertain status may cause its own psychological damage. Wald, *supra* at 667-668. *See generally*, J. Goldstein, A. Freud & A. Solnit, *supra*.

request that foster children be removed from their homes:[32]

> The foster parents frequently ask for the child's removal from the foster home. This request comes either because the emotional or adjustment problems emerging out of the incessant and endless uncertainty of it all, or from the foster parents' sheer frustration over the refusal of responsible adults . . . to make decisions that would result in a more permanent arrangement for the child.

Bryce and Ehlert, *supra* at 500.

Despite the advantages of relative placements, many relatives cannot afford to care for neglected children if they only receive AFDC payments. These relatives would be better able to accept responsibility if they could receive the higher payments available under AFDC-FC.[33] Thus, the issue in this case is *not* under which program—AFDC or AFDC-FC—children living with relatives may be covered. The real issue for the children affected is whether they will be able to live with relatives who want to care for them, or whether they will end up in institutions and the homes of strangers. As *Amici* have shown, this choice is critical for thousands of neglected children for whom placements with relatives may offer the best opportunity for healthy development.

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[32] In *Smith* v. *Organization of Foster Families, supra*, evidence showed that as many as one-third of all transfers within the foster-care system in New York are at the request of the foster parents. 431 U.S. at 826 n. 15. *See also*, Vasaly, *supra* 99-103.

[33] Studies have shown a positive relationship between the payment level for foster homes and the number of foster homes available. *See, e.g.*, Simon, *The Effect of Foster-Care Payment Levels on the Number of Foster Children Given Homes*, 49 Soc. Serv. Rev. 405, 410 (1975) (doubling the foster child payment level would increase the number of foster homes by 50 to 100 percent).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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